TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 726

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

JACOB KATZ AND GEORGE SENN

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED SEPTEMBER 12, 1925

(31449)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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82109—26——1

1 In United States District Court, Eastern District of Pennsylvania

THE UNITED STATES OF AMERICA vs. JACOB KATZ, GEORGE SENN	1123. Dec. Term, 1924

Docket entries

Mar. 6,	1925.	True bill.
" 19,	"	Demurrer filed.
" 19,	"	Motion to quash indictment filed.
" 19,	"	Petition for bill of particulars filed.
" 20,	"	Argued sur demurrer.
Apr. 29,	"	Opinion, Thompson, J., sustaining demurrer and quashing indictment, filed.
July 6,	"	Decree sustaining demurrer, quashing indictment, and allowing exceptions to plaintiff filed.
" 6,	"	Assignment of errors filed.
" 6,	"	Petition for writ of error filed.
" 6,	"	Order of court granting prayer of petition filed.
" 6,	"	Certificate of court filed.
" 6,	"	Writ of error allowed and copy thereof lodged in clerk's office for adverse party.
" 6,	"	Citation allowed and issued.
" 15,	"	Praecipe as to transcript of record filed.
Aug. 18,	"	Citation returned " tarde venit " and filed.
" 19,	"	Alias citation allowed and issued.
" 25,	"	Alias citation returned, served, and filed.

2 In United States District Court

1123

Writ of error

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America, to the Honorable the Judges of the United States District Court for the Eastern District of Pennsylvania, Greeting:

Because in the record, proceedings and judgment in a cause lately pending in the United States District Court for the Eastern District of Pennsylvania between United States of America and Jacob Katz and George Senn, it appears that the said United States of America is entitled to have the said judgment reviewed by the Supreme Court of the United States; and it having presented a petition for a writ of error and an assignment of errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to the parties afore-

said, do command you that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the honorable William Howard Taft, Chief Justice of the United States, the sixth day of July, in the year of our Lord one thousand nine hundred and twenty-five.

[SEAL.] GEORGE BRODBECK,
Clerk of the District Court of United States,
Eastern District of Pennsylvania.

Allowed by—
J. W. THOMPSON,
District Judge.

3 In United States District Court

Indictment

Filed Mar. 6, 1925

FIRST COUNT

Eastern District of Pennsylvania, ss:

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern District of Pennsylvania at the December term of said court in the year 1924, and inquiring for said district, upon their oath present that Jacob Katz and George Senn, hereinafter called defendants, on September 21, 1922, at the city of Philadelphia, in said Eastern District of Pennsylvania, unlawfully and feloniously did conspire, combine, confederate, and agree together to commit an offense against the United States, to wit, the offense on the part of said Jacob Katz of then and there selling, for the Stewart Distilling Company, a corporation under the laws of Maryland, to said George Senn, a large quantity, to wit, two hundred and fifty cases, of Stewart rye whiskey (each of which said cases then and there consisted of twelve quart bottles of said whiskey), without making, at the time of said sale or at any time, a permanent record thereof, showing in detail among other things required by law, the name and address of the person to whom said whiskey then and there was sold as aforesaid, to wit, of said George Senn, or any record except a forged record purporting to show that said whiskey was, at the time and place aforesaid, sold to Thomas A. Ruck, of Reading, Pennsylvania, accompanied by a cashier's check for the

sum of $7,000.00, payable to the order of Thomas A. Ruck, introduced by said defendants for the purpose of apparent corroboration of such supposed sale to Thomas A. Ruck, said forged record and said check being concocted to take the place of the permanent record first above mentioned required by law to be made by said Jacob Katz upon the making of such sale to said George Senn, and intended by said defendants to deceive United States prohibition agents and internal revenue officers engaged in examining such records.

Overt acts

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said conspirators, at the several times and places in that behalf hereinafter mentioned in connection with their names, did do, among many others done by said conspirators, certain acts to effect the object of said unlawful and felonious conspiracy, combination, confederation and agreement: that is to say:

1. Said Jacob Katz, on said September 21, 1922, at Philadelphia aforesaid, in said Eastern District of Pennsylvania, sold said two hundred and fifty cases of said Stewart rye whiskey to said George Senn.

2. Said George Senn, on said September 21, 1922, procured from the Sixth National Bank of Philadelphia aforesaid a cashier's check for the sum of $7,000.00 payable to the order of Thomas A. Ruck.

3. Said Jacob Katz, on said September 21, 1922, wrote his name upon the back of said cashier's check mentioned in overt act No. 2.

Conclusion

And so the grand jurors aforesaid, upon their oath aforesaid, do say that said Jacob Katz and George Senn, at the time and place, and in manner and form, aforesaid, unlawfully and feloniously did conspire to commit an offense against the United States, and did do acts to effect the object of the conspiracy: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

5 SECOND COUNT

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said Jacob Katz and George Senn, defendants, on said September 21, 1922, at Philadelphia aforesaid, in said Eastern District of Pennsylvania, unlawfully and feloniously did conspire, combine, confederate, and agree together to commit another offense against the United States, to wit, the offense on the part of said Jacob Katz of then and there selling, for said Stewart Distilling Company, corporation as aforesaid, to said George Senn, another large quantity, to wit, five hundred cases, of Stewart rye whiskey (each of which last-mentioned cases then and there con-

sisted of twelve quart bottles of said whiskey), without making, at the time of said last-mentioned sale or at any time, a permanent record thereof, showing in detail, among other things required by law, the name and address of the person to whom said last-mentioned whiskey then and there was sold as aforesaid, to wit, of said George Senn, or any record except a forged record purporting to show that that whiskey was, at the time and place aforesaid, sold to the Batchelor Drug Company of Scranton, Pennsylvania, accompanied by a cashier's check for the sum of $14,000.00, payable to the order of A. F. Batchelor, introduced by said defendants for the purpose of apparent corroboration of such supposed sale to the Batchelor Drug Company, said forged record and said check being concocted to take the place of the permanent record in this count of this indictment first above mentioned required by law to be made by said Jacob Katz upon the making of such sale to said George Senn, and intended by said defendants to deceive United States prohibition agents and internal revenue officers engaged in examining such records.

6 Overt acts

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said conspirators, at the several times and places in that behalf hereinafter mentioned in connection with their names, did do, among many others done by said conspirators, certain acts to effect the object of said unlawful and felonious conspiracy, combination, confederation and agreement in this count charged; that is to say:

1. Said Jacob Katz, on said September 21, 1922, at Philadelphia aforesaid, in said Eastern District of Pennsylvania, sold said five hundred cases of said Stewart rye whiskey to said George Senn.

2. Said George Senn, on said September 21, 1922, procured from the Peoples Bank of Philadelphia aforesaid a cashier's check for the sum of $14,000.00 payable to the order of A. F. Batchelor.

3. Said Jacob Katz, on said September 21, 1922, wrote his name upon the back of said cashier's check mentioned in overt act No. 2, appended to this count.

Conclusion

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Jacob Katz and George Senn, at the time and place, and in manner and form, in this count of this indictment aforesaid, unlawfully and feloniously did conspire to commit an offense against the United States, and did do acts to effect the object of the last-mentioned conspiracy: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

(Sgd.) GEORGE W. COLES,
United States Attorney.

8 In United States District Court

[Title omitted.]

Demurrer to indictment

Filed Mar. 19, 1925

The defendants in the above bill of indictment demur to the bill of indictment, because:

1. It is defective in form.
2. It is defective in substance.
3. Because the bill of indictment fails to set forth any crime known to the statutes of the United States.
4. Because the bill of indictment fails to set forth a crime under the statutes of the United States or the common law.

JOHN R. K. SCOTT.
Attorney for Defendants.

9 In United States District Court

[Title omitted.]

Opinion

Filed Apr. 29, 1925

THOMPSON, J.:

In indictment No. 1123 it is charged that the defendants, Katz and Senn, conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Senn 250 cases of whiskey without making the permanent record required under Section 10 of the national prohibition act.

In indictment No. 1124 it is charged that the defendants, Katz and Feuerstein, conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Feuerstein 25 barrels of whiskey without making the permanent record required under Section 10. As the two indictments charge similar offenses in a similar manner, the discussion will be directed only to No. 1123.

Section 10 provides as follows:

"No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons ot whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The
10 commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this act provided."

The objection raised to the indictment is that it does not charge that either Katz or the Stewart Distilling Company held a permit to sell, and that section 10 applies only to those holding permits, and therefore no offense is charged, because, while Congress prohibits in section 6 the sale of liquor without first obtaining a permit from the commissioner, it was not intended by section 10 that a person making a sale, unlawful under section 6, because without a permit, should be charged with the separate offense of making such unlawful sale without making a permanent record thereof showing the details set forth in the section.

The pleader has apparently endeavored, in drafting this indictment, to involve the purchaser with the seller in a conspiracy to sell, but was confronted with the rule of criminal law that where an offense is such that a concert of action between two persons is logically necessary to the completion of the crime, that is to say, the crime cannot take place without concert, a charge of conspiracy against the two persons to commit that crime does not lie. 2 Wharton Criminal Law, section 1339, United States v. Deitrich, 126 Fed. 664; Chadwick v. United States, 141 Fed. 225; Shannon v. Commonwealth, 14 Pa. 226. Section 10 therefore suggested a method of overcoming the difficulties of such a charge by setting up a conspiracy to sell without making a record of the sale. It is well settled that if a person may alone be charged with a crime another, whose concert with him is not necessary for the commission of that crime, may properly be joined with him in an indictment for conspiracy to commit the crime. Chadwick v. United States, supra; United States v. Rhodes, 212 Fed. 513; Tapack v. United States, 220 Fed. 445.

If, therefore, one who does not hold a permit may be charged
11 under section 10 with the failure to make records, another conspiring with him to fail to make the records may be indicted with him.

The question, then, is whether Congress intended to make a violation of section 10 a crime as to one selling liquor, whether or not he held a permit. I fail to see any evidence in the act of any such intention on the part of Congress. Section 6 prohibits selling without first obtaining a permit and prescribes details concerning the time when permits to sell shall expire, the length of time permits to purchase shall be in force, provisions as to what the permits shall specify, and prohibits their issue to persons violating the terms of prior permits. It provides for the prescribing by the commissioner of forms of permits and applications and empowers that official to require bonds, and provides for the review of his decision by a court of equity in the event of a refusal of an application for a permit.

Section 7 provides for permits to physicians.

Section 8 directs the commissioner to cause blanks to be printed and furnished to physicians holding permits and directs the manner in which they shall be used.

Section 9 provides for the citation of those holding permits to appear before the commissioner and authorizes revocation for cause shown.

While section 10 does not describe those who are prohibited from selling without making a record as those holding permits, the final paragraph of that section reads, "The commissioner may prescribe the form of such record which shall be at all times open to inspection as in this act provided," and apparently refers to section 34, providing that all records and reports kept or filed under the provisions of this act shall be subject to inspection by the commissioner or other officers designated and that copies of such records and reports duly certified may be introduced in evidence.

Section 11 requires manufacturers and wholesale or retail
12 druggists to keep as part of the records required of them a copy of all permits to purchase on which sales are made and prohibits them to sell except to persons having permits to purchase.

Without going into further details, sections 12 and 13 are obviously a continuation of the regulatory provisions in relation to those holding permits.

The maxims "ex antecedentibus et consequentibut fit optima interpretatio" and "noscitur a sociis" are to be borne in mind in interpreting a statute, and a penal statute is not to be extended beyond the fair meaning of the language employed. United States v. Baltimore and O. S. W. R. Co., 159 Fed. 33. In that case Judge Severns said:

"A good statement of the doctrine as applied to the case before us is contained in 26 A. and E. Encyc. of L. 616 (2nd Ed.), where it is said:

"'In construing a section of an act, regard must first be had to the language of the clause itself, and, second, to other clauses in the same act, and that construction should be adopted which makes the whole act stand consistently together or reduces the inconsistency to the smallest possible limits.'"

Applying the maxims, and the doctrine thus expressed, I am forced to the conclusion that Congress intended section 10 to apply only to sales by permittees, and did not intend to attempt the impossible; that is, to require those violating the law by selling without permits to make a permanent record of their criminal acts and to punish them for not so doing.

It is argued on the part of the Government that the indictments should stand because of the provisions of section 32, providing that it shall not be necessary in any affidavit, information, or indictment to include any defensive negative averments. But the offense intended to be charged is not subject to an exception which may be stated in the negative. If it is rightly concluded that the offense of failing to make a record is confined to those holding permits, it is a matter of description and not of defensive negative averment,

and if the defendants are to be held it must be because Katz, the seller, is included among those forbidden to sell without
13 making a record. That is, among those holding permits to sell. But there is no averment in the indictment describing Katz as one required to hold a permit, and therefore neither he nor his alleged coconspirator, Senn, are charged with an indictable offense. I think this reasoning is well sustained under the authority of the cases decided under the Harris Antinarcotic Act. Swartz v. United States, 280 Fed. 115; United States v. Carney, 228 Fed. 163; United States v. Wilson, 225 Fed. 82; United States v. Friedman, 224 Fed. 276; United States v. Woods, 224 Fed. 278.

And finally in United States v. Jin Fuey Moy, 241 U. S. 394, it was settled by the Supreme Court in an opinion by Mr. Justice Holmes that an indictment would not lie under section 8 of that act except against those required to register under section 1. The charge in the indictment was a conspiracy of Jin Fuey Moy with Willie Martin to have in Martin's possession narcotic drugs, Martin not being registered with the collector of internal revenue and not having paid the special tax as required under section 1 of the act. Section 8 declares it unlawful for any person who is not registered and has not paid the special tax to have in his possession or control any of the said drugs. Judge Thomson of the Western District of Pennsylvania was sustained in holding the general words "any person" must be confined to the class of persons with whom the act previously had been purporting to deal, that is to say, those producing, importing, manufacturing, compounding, dealing in, dispensing, selling, distributing, or giving away such drugs.

It is concluded that the indictments fail to set forth an indictable offense, and the demurrers are therefore sustained and the indictments quashed.

14 In United States District Court

[Title omitted.]

Order sustaining demurrer

July 6, 1925

Before THOMPSON, J.:

And now, to wit, this 6th day of July, 1925, the above-entitled case having come on for argument upon a demurrer to the indictment on the ground that said indictment did not set forth a crime, and was heard by this court on the 20th day of March, 1925; now, after listening to the argument of counsel for the United States and for the defendant, and having duly considered the same, and being fully advised,

It is ordered that said demurrer be and the same is hereby sustained and the indictment quashed and dismissed to which the plaintiff excepts and the exception is allowed.

(Sgd.) J. W. THOMPSON, *J.*

15 In United States District Court

[Title omitted.]

Petition for writ of error

July 6, 1925

To the Honorable the Judges of the said Court:

The United States of America, plaintiff in the above-entitled cause, feeling itself aggrieved by the order entered herein on the 6th day of July, 1925, sustaining the demurrer to the indictment in said cause and quashing said indictment and dismissing the case on file herein, and in the record and proceedings had in said cause, complains that manifest error was committed to the prejudice of the said United States, all of which is more fully alleged and set forth in the assignments of errors filed herein in aid of, this petition for a writ of error.

Wherefore said plaintiff, United States of America, prays that a writ of error be issued in this behalf to the Supreme Court of the United States in accordance with the provisions of the laws of the United States for the correction of the errors complained of and herewith assigned, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Supreme Court of the United States.

GEORGE W. COLES,
United States Attorney,
Attorney for Petitioner in Error.

16 In United States District Court

[Title omitted.]

Order allowing writ of error

July 6, 1925

The plaintiff, United States of America, having this day filed its petition for a writ of error from the Supreme Court of the United States to review the order entered herein on the 6th day of July, 1925, sustaining the demurrer to the indictment and quashing and dismissing the indictment in this case, together with the assignment of errors specifying matters complained of and of which defendants will complain:

Now, therefore, it is ordered that writ of error be and hereby is allowed for the purpose of review in the Supreme Court of the United States of the said order entered herein.

By the court:

J. W. THOMPSON,
United States District Judge.

17 In United States District Court

[Title omitted.]

Assignments of error

Filed July 6, 1925

Now comes the United States of America, by George W. Coles, United States attorney for the eastern district of Pennsylvania, and says that in the aforesaid proceedings, and in the decision and judgment of said United States District Court for said district sustaining the demurrer of the defendants, there is manifest error in this, that—

1. Said court erred in sustaining said demurrer to said indictment in said cause, based upon a construction of the statutes of the United States upon which said indictment was founded, in holding that there was no statute of the United States making the matters charged in said indictment a crime.

2. Said court erred in giving judgment for said defendants upon the same holding.

Wherefore said United States prays that the aforesaid judgment may be reversed.

GEORGE W. COLES,
United States Attorney,
for the Eastern District of Pennsylvania.

18–19 [Citation in usual form showing service on John R. K. Scott omitted in printing.]

20 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed July 15, 1925

To the Clerk of the District Court for the Eastern District of Pennsylvania:

SIR: You are hereby requested in making up your return to the citation on the writ of error herein to include the following:

Indictment,
Demurrer,
Memorandum decision,
Order sustaining demurrer and quashing indictment,
Petition for writ of error,

Order allowing writ of error,
Assignments of errors,
Writ of error,
Citation,
Praecipe for record,

which includes all the papers, records, and other pleadings necessary to the hearing of the writ of error in the Supreme Court of the United States, and that no other records or pleadings than those above mentioned need be included by the clerk of said court in making up his return to said citation.

GEORGE W. COLES,
United States Attorney,
Attorney for Plaintiff.

21 [Clerk's certificate to foregoing papers omitted in printing.]

22 **In Supreme Court of the United States**

Statement of points to be relied upon and designation by plaintiff in error of parts of record to be printed

Filed Sept. 18, 1925

The plaintiff in error intends to rely upon the contentions that the District Court erred in sustaining, upon the following grounds, the demurrer and motion to quash the indictment:

(1) That the indictment failed to charge a conspiracy to violate section 10 of Title II of the national prohibition act because it failed to allege that the defendant, Jacob Katz, or the Stewart Distilling Company, which he represented, had a permit, issued under the provisions of the national prohibition act or regulations made pursuant thereto, to sell intoxicating liquor.

(2) That section 10 of Title II of the national prohibition act requires the making of a permanent record of the sale of intoxicating liquor only by a person having a permit, issued under the provisions of the national prohibition act or regulations made pursuant thereto, to sell intoxicating liquor.

The plaintiff in error thinks that the entire record as filed will be necessary for the consideration of the claimed errors above enumerated.

WILLIAM D. MITCHELL,
Solicitor General.

SEPT. 16, 1925.

Service of a copy of the foregoing statement of points is hereby acknowledged this —— day of September, 1925.

23 At Philadelphia, in my district, I served a copy of the within statement upon Benjamin M. Golder, Esq., at his office in the Finance Building, and John R. K. Scott, Esq., at his office in

the Lincoln Building, this 22nd day of September, 1925, by handing, to each of said counsel personally, a true and correct copy of the same.

So answers

W. FRANK MATHUES,
United States Marshal.
Per WM. H. CLARK, *Deputy.*

Sworn to and subscribed before me this 22 day of September, A. D. 1925.

[SEAL.] EDGAR GARRETT,
Deputy Clerk, District Court United States,
Eastern District of Pennsylvania.

c [File endorsement omitted.]

d [Endorsement on cover:] File No. 31449. E. Pennsylvania, D. C. U. S. Term No. 726. The United States of America, plaintiff in error, vs. Jacob Katz and George Senn. Filed September 12th, 1925. File No. 31449.

( )

13

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 727

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

JACOB KATZ AND HERMAN FEUERSTEIN

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED SEPTEMBER 12, 1925

(31450)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 727

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

JACOB KATZ AND HERMAN FEUERSTEIN

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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1 In United States District Court, Eastern District of Pennsylvania

THE UNITED STATES OF AMERICA
vs.
JACOB KATZ, HERMAN FEUERSTEIN
1124. December term, 1924

Docket entries

Mar.	6, 1925.	True bill.
"	19, "	Demurrer filed.
"	19, "	Motion to quash indictment filed.
"	19, "	Petition for bill of particulars filed.
"	20, "	Argued sur demurrer.
Apr.	29, "	Opinion, Thompson, J., sustaining demurrer and quashing indictment filed.
July	6, "	Decree sustaining demurrer and quashing indictment and allowing exception to plaintiff filed.
"	6, "	Petition for writ of error filed.
"	6, "	Order of court allowing writ of error filed.
"	6, "	Assignments of error filed.
"	6, "	Certificate of court filed.
"	6, "	Writ of error allowed to U. S. Supreme Court and copy thereof lodged in clerk's office for adverse party.
"	6, "	Citation allowed and issued.
"	15, "	Praecipe as to transcript of record filed.
Aug.	18, "	Citation returned "tarde venit" and filed.
"	19, "	Alias citation allowed and issued.
"	27, "	Alias citation returned served and filed.

2 In United States District Court

Writ of error

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the United States District Court for Eastern District of Pennsylvania, Greeting:

Because in the record, proceedings, and judgment in a cause lately pending in the United States District Court for the Eastern District of Pennsylvania between United States of America and Jacob Katz and Herman Feuerstein it appears that the said United States of America is entitled to have the said judgment reviewed by the Supreme Court of the United States; and its having presented a petition for a writ of error and an assignment of errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to the parties

aforesaid, do command you that under your seal, distinctly and openly, you send the record, proceedings, and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the honorable William Howard Taft, Chief Justice of the United States, the sixth day of July, in the year of our Lord one thousand nine hundred and twenty-five.

[SEAL.] GEORGE BRODBECK,
Clerk of the District Court of United States,
Eastern District of Pennsylvania.

Allowed by—
J. W. THOMPSON,
District Judge.

3 In United States District Court

Indictment

Filed Mar. 6, 1925

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern District of Pennsylvania at the December term of said court in the year 1924, and inquiring for said district, upon their oath present, that Jacob Katz and Herman Feuerstein, hereinafter called defendants, on August 31, 1922, at the city of Philadelphia, in said Eastern District of Pennsylvania, unlawfully and feloniously did conspire, combine, confederate, and agree together to commit an offense against the United States, to wit, the offense on the part of said Jacob Katz of then and there selling, for the Stewart Distilling Company, a corporation under the laws of Maryland, to said Herman Feuerstein a large quantity, to wit, twenty-five barrels, bearing serial numbers as follows:

7586462/3, 4, 5, 6,
7586477/8, 9, 80, 81,
7586485,
7586467/8, 9, 70, 1, 2, 3, 4, 5, 6,
7586482/3, 4,
7586486,

of Stewart Rye Whiskey, without making, at the time of said sale or at any time, a permanent record thereof, showing in detail, among

other things required by law, the name and address of the person to whom said whiskey then and there was sold as aforesaid, to wit, of said Herman Feuerstein, or any record except a forged record purporting to show that said whiskey was, at the time and place aforesaid, sold to the Peerless Drug and Candy Company, of
4 Reading, Pennsylvania, accompanied by a cashier's check for the sum of $7,000.00, payable to the order of Howard Dietrich, introduced by said defendants for the purpose of apparent corroboration of such supposed sale to the Peerless Drug and Candy Company, said forged record and said check being concocted to take the place of the permanent record first above mentioned required by law to be made by said Jacob Katz upon the making of such sale to said Herman Feuerstein, and intended by said defendants to deceive United States prohibition agents and internal revenue officers engaged in examining such records.

OVERT ACT

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said conspirators, at the several times and places in that behalf hereinafter mentioned in connection with their nsmes, did do, among many others done by said conspirators, certain acts to effect the object of said unlawful and felonious conspiracy, combination, confederation, and agreement: that is to say:

1. Said Jacob Katz, on said August 31, 1922, at Philadelphia aforesaid, in said Eastern District of Pennsylvania, sold said twenty-five barrels of said Stewart rye whiskey to said Herman Feuerstein.

2. Said Herman Feuerstein, on said August 31, 1922, procured from the Republic Trust Company, of Philadelphia aforesaid, a cashier's check for the sum of $7,000.00 payable to the order of Howard Dietrich.

3. Said Jacob Katz, on said August 31, 1922, wrote his name upon the back of said cashier's check mentioned in overt act No. 2.

CONCLUSION

And so the grand jurors aforesaid, upon their oath aforesaid, do say that said Jacob Katz and Herman Feuerstein, at the time and place, and in manner and form, aforesaid, unlawfully and feloniously did conspire to commit an offense against the United
5 States, and did do acts to effect the object of the conspiracy: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

(Sgd.) GEORGE W. COLES,
United States Attorney.

[Omitted.]

7 In United States District Court

[Title omitted.]

Demurrer to indictment

Filed Mar. 19, 1925

The defendants in the above bill of indictment demur to the bill of indictment, because:

1. It is defective in form.
2. It is defective in substance.
3. Because the bill of indictment fails to set forth any crime known to the statutes of the United States.
4. Because the bill of indictment fails to set forth a crime under the statutes of the United States or the common law.

JOHN R. K. SCOTT,
Attorney for Defendants.

8 In United States District Court

[Title omitted.]

Opinion

Filed Apr. 29, 1925

THOMPSON, J.:

In indictment No. 1123 it is charged that the defendants, Katz and Senn, conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Senn 250 cases of whiskey without making the permanent record required under section 10 of the national prohibition act.

In indictment No. 1124 it is charged that the defendants, Katz and Feuerstein, conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Feuerstein 25 barrels of whiskey without making the permanent record required under section 10. As the two indictments charge similar offenses in a similar manner, the discussion will be directed only to No. 1123.

Section 10 provides as follows:

"No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The
9 commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this act provided."

The objection raised to the indictment is that it does not charge that either Katz or the Stewart Distilling Company held a permit to sell, and that section 10 applies only to those holding permits, and therefore no offense is charged, because, while Congress prohibits in section 6 the sale of liquor without first obtaining a permit from the commissioner, it was not intended by section 10 that a person making a sale, unlawful under section 6, because without a permit, should be charged with the separate offense of making such unlawful sale without making a permanent record thereof showing the details set forth in the section.

The pleader has apparently endeavored, in drafting this indictment, to involve the purchaser with the seller in a conspiracy to sell, but was confronted with the rule of criminal law that where an offense is such that a concert of action between two persons is logically necessary to the completion of the crime, that is to say, the crime cannot take place without concert, a charge of conspiracy against the two persons to commit that crime does not lie. 2 Wharton Criminal Law, section 1339; United States v. Deitrich, 126 Fed. 664; Chadwick v. United States, 141 Fed. 225; Shannon v. Commonwealth, 14 Pa. 226. Section 10 therefore suggested a method of overcoming the difficulties of such a charge by setting up a conspiracy to sell without making a record of the sale. It is well settled that if a person may alone be charged with a crime another, whose concert with him is not necessary for the commission of that crime, may properly be joined with him in an indictment for conspiracy to commit the crime. Chadwick v. United States, supra; United States v. Rhodes, 212 Fed. 513; Tapack v. United States, 220 Fed. 445.

If, therefore, one who does not hold a permit may be charged under section 10 with the failure to make records, another conspiring with him to fail to make the records may be indicted with him.

The question then is whether Congress intended to make a violation of section 10 a crime as to one selling liquor, whether or not he held a permit. I fail to see any evidence in the act of any such intention on the part of Congress. Section 6 prohibits selling without first obtaining a permit and prescribes details concerning the time when permits to sell shall expire, the length of time permits to purchase shall be in force, provisions as to what the permits shall specify, and prohibits their issue to persons violating the terms of prior permits. It provides for the prescribing by the commissioner of forms of permits and applications and empowers that official to require bonds, and provides for the review of his decision by a court of equity in the event of a refusal of an application for a permit.

Section 7 provides for permits to physicians.

Section 8 directs the commissioner to cause blanks to be printed and furnished to physicians holding permits and directs the manner in which they shall be used.

Section 9 provides for the citation of those holding permits to appear before the commissioner and authorizes revocation for cause shown.

While section 10 does not describe those who are prohibited from selling without making a record as those holding permits, the final paragraph of that section reads, "The commissioner may prescribe the form of such record which shall be at all times open to inspection as in this Act provided," and apparently refers to section 34, providing that all records and reports kept or filed under the provisions of this act shall be subject to inspection by the commissioner or other officers designated and that copies of such records and reports duly certified may be introduced in evidence.

Section 11 requires manufacturers and wholesale or retail
11 druggists to keep as part of the records required of them a copy of all permits to purchase on which sales are made and prohibits them to sell except to persons having permits to purchase.

Without going into further details, sections 12 and 13 are obviously a continuation of the regulatory provisions in relation to those holding permits.

The maxims "ex antecedentibus et consequentibut fit optima interpretatio" and "noscitur a sociis" are to be borne in mind in interpreting a statute, and a penal statute is not to be extended beyond the fair meaning of the language employed. United States v. Baltimore and O. S. W. R. Co., 159 Fed. 33. In that case Judge Severns said:

"A good statement of the doctrine as applied to the case before us is contained in 26 A. and E. Encyc. of L. 616 (2nd Ed.), where it is said:

"'In construing a section of an act, regard must first be had to the language of the clause itself; and, second, to other clauses in the same act, and that construction should be adopted which makes the whole act stand consistently together or reduces the inconsistency to the smallest possible limits.'"

Applying the maxims, and the doctrine thus expressed, I am forced to the conclusion that Congress intended section 10 to apply only to sales by permittees, and did not intend to attempt the impossible, that is, to require those violating the law by selling without permits to make a permanent record of their criminal acts and to punish them for not so doing.

It is argued on the part of the Government that the indictments should stand because of the provisions of section 32, providing that it shall not be necessary in any affidavit, information, or indictment to include any defensive negative averments. But the offense intended to be charged is not subject to an exception which may be stated in the negative. If it is rightly concluded that the offense of failing to make a record is confined to those holding permits, it

is a matter of description and not of defensive negative averment, and if the defendents are to be held it must be because Katz, the seller, is included among those forbidden to sell without making a record; that is, among those holding permits to sell.

12 But there is no averment in the indictment describing Katz as one required to hold a permit, and therefore neither he nor his alleged coconspirator, Senn, are charged with an indictable offense. I think this reasoning is well sustained under the authority of the cases decided under the Harris Antinarcotic Act. Swartz v. United States, 280 Fed. 115; United States v. Carney, 228 Fed. 163; United States v. Wilson, 225 Fed. 82; United States v. Friedman, 224 Fed. 276; United States v. Woods, 224 Fed. 278.

And finally in United States v. Jin Fuey Moy, 241 U. S. 394, it was settled by the Supreme Court in an opinion by Mr. Justice Holmes that an indictment would not lie under section 8 of that act except against those required to register under section 1. The charge in the indictment was a conspiracy of Jin Fuey Moy with Willie Martin to have in Martin's possession narcotic drugs, Martin not being registered with the collector of internal revenue and not having paid the special tax as required under section 1 of the act. Section 8 declares it unlawful for any person who is not registered and has not paid the special tax to have in his possession or control any of the said drugs. Judge Thomson, of the western district of Pennsylvania, was sustained in holding the general words "any person" must be confined to the class of persons with whom the act previously had been purporting to deal; that is to say, those producing, importing, manufacturing, compounding, dealing in, dispensing, selling, distributing, or giving away such drugs.

It is concluded that the indictments fail to set forth an indictable offense, and the demurrers are therefore sustained and the indictments quashed.

13 In United States District Court

[Title omitted.]

Order sustaining demurrer

July 6, 1925

Before THOMPSON, J.:

And now, to wit, this 6th day of July, 1925, the above-entitled case having come on for argument upon a demurrer to the indictment on the ground that said indictment did not set forth a crime, and was heard by this court on the 20th day of March, 1925; now, after listening to the argument of counsel for the United States and for the defendant, and having duly considered the same, and being fully advised,

It is ordered that said demurrer be and the same is hereby sustained and the indictment quashed and dismissed, to which the plaintiff excepts and the exception is allowed.

(Sgd.) J. W. THOMPSON, *J.*

14 In United States District Court

[Title omitted.]

Petition for writ of error

Filed July 6, 1925

To the Honorable the Judges of the said Court:

The United States of America, plaintiff in the above-entitled cause, feeling itself aggrieved by the order entered herein on the 6th day of July, 1925, sustaining the demurrer to the indictment in said cause and quashing said indictment and dismissing the case on file herein, and in the record and proceedings had in said cause, complains that manifest error was committed to the prejudice of the said United States, all of which is more fully alleged and set forth in the assignments of errors filed herein in said of this petition for a writ of error.

Wherefore said plaintiff, United States of America, prays that a writ of error be issued in this behalf to the Supreme Court of the United States in accordance with the provisions of the laws of the United States for the correction of the errors complained of and herewith assigned, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Supreme Court of the United States.

GEORGE W. COLES,
United States Attorney,
Attorney for Petitioner in Error.

15 In United States District Court

[Title omitted.]

Order allowing writ of error

Filed July 6, 1925

The plaintiff, United States of America, having this day filed its petition for a writ of error from the Supreme Court of the United States to review the order entered herein on the 6th day of July, 1925, sustaining the demurrer in the indictment and quashing and dismissing the indictment in this case, together with the assignment of errors specifying the matters complained of and of which defendents will complain;

Now, therefore, it is ordered that writ of error be and hereby is allowed for the purpose of review in the Supreme Court of the United States of the said order entered herein.

By the court:

J. W. THOMPSON,
United States District Judge.

16 In United States District Court

[Title omitted.]

Assignments of error

Filed July 6, 1925

Now comes the United States of America, by George W. Coles, United States attorney for the Eastern District of Pennsylvania, and says that in the aforesaid proceedings, and in the decision and judgment of said United States District Court for said district sustaining the demurrer of the defendents, there is manifest error in this, that—

1. Said court erred in sustaining said demurrer to said indictment in said cause, based upon a construction of the statutes of the United States upon which said indictment was founded, in holding that there was no statute of the United States making the matters charged in said indictment a crime.

2. Said court erred in giving judgment for said defendants upon the same holding.

Wherefore said United States prays that the aforesaid judgment may be reversed.

GEORGE W. COLES,
United States Attorney,
for the Eastern District of Pennsylvania.

17–18 [Citation in usual form showing service on Benjamin M. Golder and John R. Scott omitted in printing.]

19 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed July 15, 1925

To the Clerk of the District Court for the Eastern District of Pennsylvania:

SIR: You are hereby requested in making up your return to the citation on the writ of error herein to include the following:

Indictment,
Demurrer,
Memorandum decision,
Order sustaining demurrer and quashing indictment,
Petition for writ of error,
Order allowing writ of error,
Assignments of errors,
Writ of error,
Citation,
Praecipe for record,

which includes all the papers, records, and other pleadings necessary to the hearing of the writ of error in the Supreme Court of the United States, and that no other records or pleadings than those above mentioned need be included by the clerk of said court in making up his return to said citation.

GEORGE W. COLES,
United States Attorney,
Attorney for Plaintiff.

20 [Certificate to foregoing papers omitted in printing.]

21 In Supreme Court of the United States

Statement of points to be relied upon and designation by plaintiff in error of parts of record to be printed

Filed Sept. 18, 1925

The plaintiff in error intends to rely upon the contentions that the District Court erred in sustaining, upon the following grounds, the demurrer and motion to quash the indictment:

(1) That the indictment failed to charge a conspiracy to violate section 10 of Title II of the national prohibition act because it failed to allege that the defendant, Jacob Katz, or the Stewart Distilling Company, which he represented, had a permit, issued under the provisions of the national prohibition act or regulations made pursuant thereto, to sell intoxicating liquor.

(2) That section 10 of Title II of the national prohibition act requires the making of a permanent record of the sale of intoxicating liquor only by a person having a permit, issued under the provisions of the national prohibition act or regulations made pursuant thereto, to sell intoxicating liquor.

The plaintiff in error thinks that the entire record as filed will be necessary for the consideration of the claimed errors above enumerated.

WILLIAM D. MITCHELL,
Solicitor General.

SEPT. 16, 1925.

Service of a copy of the foregoing statement of points is hereby acknowledged this _____ day of September, 1925.

At Philadelphia, in my district, I served a copy of the within tatement upon Benjamin M. Golder, Esq., at his office in the Finance Building, and John R. K[illegible]cott, Esq., at his office in the Lincoln Building, this 22nd day of September, 1925, by handing, to each f said counsel personally, a true and correct copy of the same.

So answers:

W. FRANK MATHUES,
United States Marshal.
Per W. H. CLARK, *Deputy.*

Sworn to and subscribed before me this 22 day of September, . D. 1925.

[SEAL.]

EDGAR GARRETT,
Deputy Clerk District Court, United States,
Eastern District of Pennsylvania.

File endorsement omitted.

[Endorsed on cover:] File No. 31450. E. Pennsylvania, D. C. U. S. Term No. 727. The United States of America, plaintiff in error, vs. Jacob Katz and Herman Feuerstein. Filed September 12th, 1925. File No. 31450.

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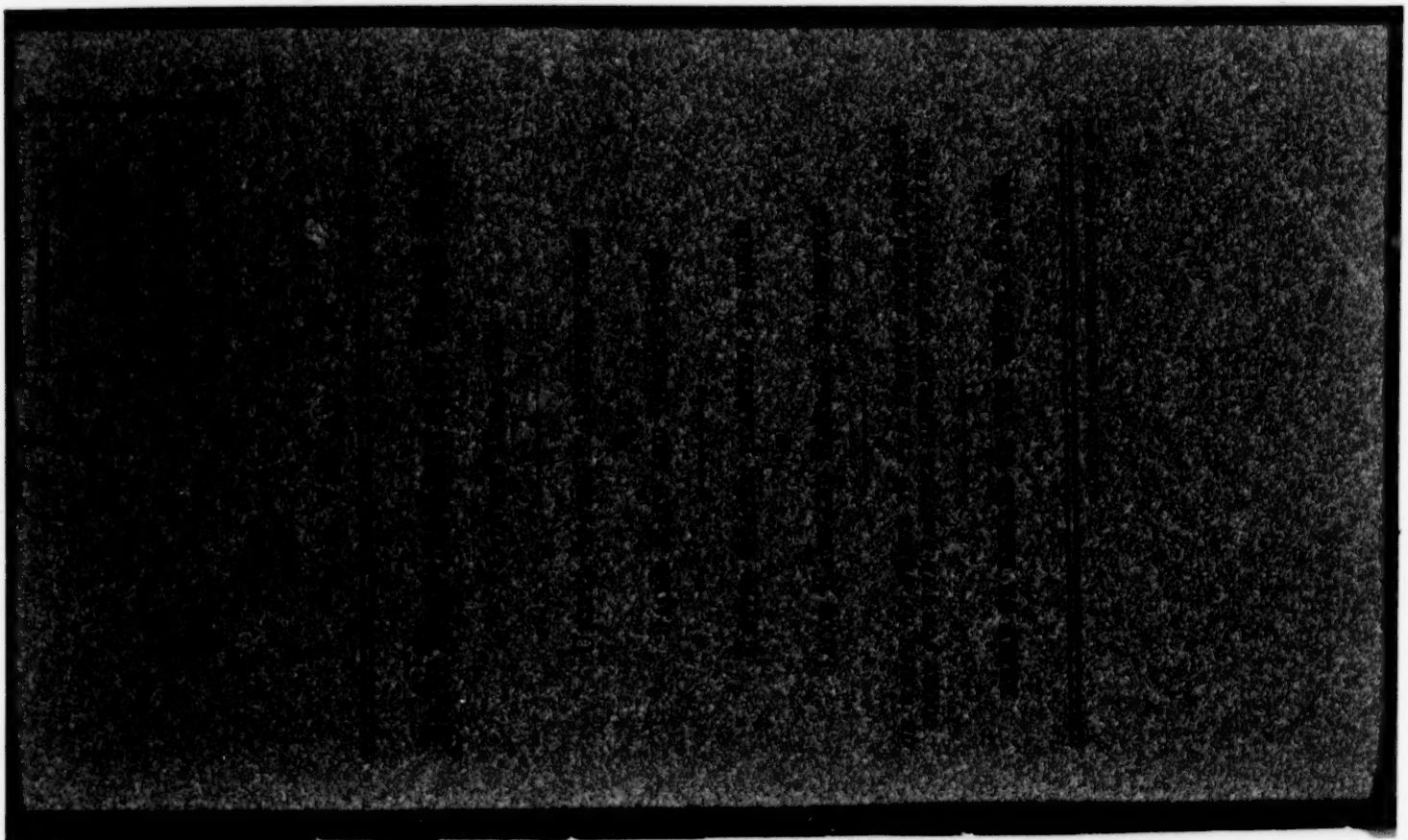

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 726

UNITED STATES, PLAINTIFF IN ERROR

v.

JACOB KATZ AND GEORGE SENN

No. 727

UNITED STATES, PLAINTIFF IN ERROR

v.

JACOB KATZ AND HERMAN FEUERSTEIN

ON WRITS OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF ON BEHALF OF THE UNITED STATES

OPINION OF THE COURT BELOW

The opinion of the District Court will be found in 5 F. (2d) 527 and on page 5 of the Record in Case No. 726 and on page 4 in Case No. 727.

JURISDICTION

These cases come before the Court on writs of error granted to the Government on July 6, 1925, under the provisions of the Criminal Appeals Act of March 2, 1907, Chap. 2564, 34 Stat. 1246, following the decision of Judge Thompson on the same day in sustaining demurrers to indictments for conspiracies to violate the National Prohibition Act. (R. 8, 9, No. 726; R. 7, 8, No. 727.)

STATEMENT

Defendants in error were charged in two indictments, filed March 6, 1925, in the District Court for the Eastern District of Pennsylvania, with conspiracy to commit the offense of selling whiskey without making a permanent record as required by Section 10, Title II, of the National Prohibition Act.

In case No. 726 the indictment charged that defendants Jacob Katz and George Senn entered into a conspiracy to commit an offense against the United States, to wit, the offense on the part of Katz of selling to Senn, for the Stewart Distilling Company, 750 cases of whiskey without making the permanent record required under Section 10, Title II, of the National Prohibition Act. (R. 2–3.)

In case No. 727 the indictment charged that defendants Katz and Herman Feuerstein conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling to Feuerstein, for the Stewart Distilling Company, 25

barrels of whiskey, without making the permanent record required by said Section 10. (R. 2.)

Demurrers and motions to quash the indictments were interposed on the theory that the aforesaid section applied only to persons holding permits and, as the indictments failed to allege that either Katz or the Stewart Distilling Company held permits to sell, no offense was charged under the statute. (R. 5, 6, No. 726; R. 4, 5, No. 727.)

As the two indictments charged similar offenses, they were considered together and disposed of by the court at the same time.

The court sustained the demurrers and quashed the indictments (R. 8, No. 726; R. 7, No. 727), whereupon writs of error were sued out by the Government, as above stated.

STATUTE INVOLVED

The statute involved in this case is Section 10, Title II, of the National Prohibition Act (Chap. 85, 41 Stat. 305, 312), reading as follows:

> No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may pre-

scribe the form of such record, which shall at all times be open to inspection as in this Act provided.

QUESTION PRESENTED

The question presented is whether the above section requiring the making of a permanent record, includes all persons who sell liquor, whether permit holders or not, or whether it applies only to persons holding permits under the National Prohibition Act. In other words, whether an indictment, in order to state an offense under the statute must charge that at the time the offense was committed the defendants held permits to sell.

ARGUMENT

SUMMARY

I. The terms of the statute being plain and unambiguous, it should have been given a literal construction.

II. The court erred in resorting to maxims to aid in the construction of the statute.

III. Decisions under the Anti-Narcotic Act are not applicable to this case.

I

THE TERMS OF THE STATUTE BEING PLAIN AND UNAMBIGUOUS, IT SHOULD HAVE BEEN GIVEN A LITERAL CONSTRUCTION

The Eighteenth Amendment provides that " the manufacture, sale, or transportation of intoxicating liquors within * * * the United States

* * * for beverage purposes is hereby prohibited " (Sec. 1); and that " Congress and the several States shall have concurrent power to enforce this Article by appropriate legislation " (Sec. 2).

The National Prohibition Act enacted in pursuance of this Amendment provides that no person shall " manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor " except as authorized in the Act; that all its provisions shall be liberally construed to the end that " the use of intoxicating liquor as a beverage " may be prevented, and that intoxicating liquor " for nonbeverage purposes " may be manufactured, sold, etc., " but only " as provided in the Act, and the Commissioner of Internal Revenue may issue permits therefor (Sec. 3, Title II); that no one shall manufacture, sell, etc., intoxicating liquor without first obtaining a permit from the Commissioner, with exceptions not here material (Sec. 6, Title II); that it shall be unlawful to possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, and no property rights shall exist in such liquor or property (Sec. 25, Title II); that it shall not be necessary to include any defensive negative averments in an indictment or information (Sec. 32, Title II); and that after February 1, 1920, the possession of liquors by any person not legally permitted " under this title to possess liquor shall be prima facie evidence that

> from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation." The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction. Very strong expressions have been used by the courts to emphasize the principle that they are to derive their knowledge of the legislative intention from the words or language of the statute itself which the legislature has used to express it, if a knowledge of it can be so derived.

The same author (p. 700) quotes the following from the language of the Maryland Court of Appeals in *Alexander* v. *Worthington,* 5 Md. 485:

> We are not at liberty to imagine an intent and bind the letter of the act to that intent; much less can we indulge in the license of striking out and inserting and remodeling, with the view of making the letter express an intent which the statute in its native form does not evidence. Every construction, therefore, is vicious which requires great changes in the letter of the statute, and, of

> the several constructions, that is to be preferred which introduces the most general and uniform remedy.

In *United States* v. *Goldenberg,* 168 U. S. 95, this Court said (pp. 102–103):

> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent.

But the court below disregarded this rule and held, erroneously, as we contend, that there was nothing in Section 10 to indicate that Congress intended it to apply to nonpermit holders. The court admitted that the section does not describe those who are prohibited from selling without making a record as those only who hold permits, but in reaching the conclusion that such was the intent of the statute, the court resorted to the maxims "*ex antecedentibus et consequentibus fit optima interpretatio*" and "*noscitur a sociis.*"

II

THE COURT ERRED IN RESORTING TO MAXIMS TO AID IN THE CONSTRUCTION OF THE STATUTE

One reason for applying the above maxims was because of the association of Section 10 with other provisions in the Act dealing with permits.

Of the permit provisions immediately preceding Section 10, Section 6 prohibits selling without first obtaining a permit; prescribes details concerning the time when permits to sell shall expire, and the length of time permits to purchase shall be in force; provides what the permits shall specify, and prohibits their issue to persons violating the terms of prior permits. It provides for the prescribing by the Commissioner of Internal Revenue of forms of permits and applications; empowers that official to require bonds, and provides for the review of his decision by a court of equity in the event of a refusal of an application for a permit. Section 7 pertains to permits for physicians. Section 8 directs the Commissioner to cause blanks to be printed and furnished to physicians holding permits and directs the manner in which they shall be used. Section 9 provides for citation of those holding permits to appear before the Commissioner and authorizes revocation for cause shown.

Of the sections immediately following Section 10, Section 11 requires manufacturers and wholesale

or retail druggists to keep as part of the records required of them a copy of all permits to purchase on which sales are made, and prohibits their selling to persons not having permits to purchase. Section 12 directs that all persons manufacturing liquor for sale shall attach to the container a label giving the name of the manufacturer of the liquor, etc., and the number of the permit authorizing the manufacture thereof. Section 13 pertains to carriers' records or authorizes delivery only to persons presenting permits to purchase.

It will be seen, however, that these provisions are quite unlike those contained in Section 10. No reference is made in that section to permits or permit holders. It contains none of the regulatory provisions pertaining to those holding permits. It states that *no person* shall manufacture, purchase for sale, sell, or transport liquor without making certain records. This certainly is open to the construction that *all persons,* whether permit holders or not, are included within the statute.

Furthermore, no special significance can be attached to the location of this section at that particular place in the statute. It could just as readily have been inserted elsewhere. The order in which provisions occur in a statute is immaterial where the meaning is plain. Sutherland on Statutory Constructon, *supra,* Sec. 344; *Gibbons* v. *Brittenum,* 56 Miss. 232, 257. This particular provision is not new in the legislative field. Similar

provisions are to be found in the old Internal Revenue Laws. It undoubtedly was taken from Section 3318, Revised Statutes, as amended by the Act of February 27, 1877, Chap. 69, 19 Stat. 240, 248, and by Section 5, Act of March 1, 1879, Chap. 125, 20 Stat. 327, 339, which contains provisions similar to those found in Section 10. There is this distinction, however. That statute requires the book or record to be kept only by the rectifier or wholesale liquor dealer, while here the record is to be kept by every person manufacturing and trafficking in liquor. See also Section 3303, Revised Statutes, pertaining to records to be kept by distillers.

A more grievous error, however, as the Government views the case, was made by the court when it resorted to maxims to aid in the construction of a statute that is clear and unambiguous on its face. The quotation adopted by the court from 26 A. and E. Ency. of Law, 616, contains this statement: "In construing a section of an act regard must first be had to the language of the clause itself." The Government contends that the court had no right to resort to the maxims employed by it and thereby to read into the statute a distinction which Congress neither made nor intended to make.

Benson v. *Chicago, Etc., Ry. Co.*, 75 Minn. 163, involved a statute giving a right of action to railroad employees injured by the negligence of a co-employee while engaged in operating passenger, freight or other trains, engines or cars. It was

held that the word "cars" included hand-cars. The claim was made that being associated with trains and engines it meant only cars usually operated in trains and by means of locomotives. The court said (p. 167):

> A court has no right to resort to the maxims of *noscitur a sociis* or *ejusdem generis* for the purpose of reading into a statute a distinction which the legislature neither made nor intended to make. These rules are not the masters of the courts, but merely their servants, to aid them in ascertaining the legislative intent. They afford a mere suggestion to the judicial mind that, where it clearly appears that the lawmakers were thinking of a particular class of persons or objects, their words of more general description may not have been intended to embrace any other than those within the class. Hand cars are used in the ordinary business of railroads. As already suggested, their use is within the mischief of the statute.

Even under the rule of strict construction of penal statutes the court's decision should not be sustained. Particularly applicable here, when the evil to be remedied and the object to be attained by the National Prohibition Act are taken into consideration, is the language found in the opinion of this Court in *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1. The question there was whether locomotive engines were included in the words "any

car " contained in the Safety Appliance Act then before the court and which required cars engaged in interstate commerce to be equipped with automatic couplers. In holding that engines were so included this Court said (p. 17):

> The primary object of the act was to promote the public welfare by securing the safety of employees and travelers, * * *.
>
> Moreover, it is settled that " though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature."

The Court then cited (p. 18) *United States* v. *Lacher,* 134 U. S. 624, where it quoted from *United States* v. *Winn,* 3 Sumn. 209, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:

> I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of

> no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature.

Equally applicable is the case of *United States* v. *Corbett,* 215 U. S. 233, where this Court, in holding that the words " any agent " found in Section 5209, Revised Statutes, were intended to embrace the Comptroller of the Currency, said (pp. 242–243):

> The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute in disregard of their context and in frustration of the obvious legislative intent. *United States* v. *Hartwell,* 6 Wall. 385. In that case, answering the contention that penal laws are to be construed strictly, the court said (p. 395):
>
> " The object in construing penal, as well as other statutes, is to ascertain the legislative intent. * * * The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words,

and they must be such as to leave no room for a reasonable doubt upon the subject. * * * The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

It is to be observed that the rule thus stated affords no ground for extending a penal staute beyond its plain meaning. But it inculcates that a meaning which is within the text and within its clear intent is not to be departed from because, by resorting to a narrow and technical interpretation of particular words, the plain meaning may be distorted and the obvious purpose of the law be frustrated.

See also:

Bolles v. *Outing Co.*, 175 U. S. 262, 265.

United States v. *Lexington Mill Co.*, 232 U. S. 399, 409.

Ash Sheep Co. v. *United States*, 252 U. S. 159, 170.

But even if in the District Court's view of the statute it felt constrained to go outside for aids of construction, we earnestly contend that it should not have confined itself to the provisions im-

U.S. v Cisco 262/165-167

mediately surrounding Section 10 but should have considered the statute as a whole. In *Rice* v. *Ashland County,* 108 Wis. 189, 192, it was said:

> We must * * * look to the Act as a whole, to the subject with which it deals, to the reason and spirit of the enactment, and thereby, if possible, discover its real purpose.

The court should have considered all parts of the Act, especially those providing that no person shall manufacture and traffic in intoxicating liquor except as authorized by the Act; that it shall be unlawful to possess any liquor or property designed for the manufacture of liquor intended for use in violation of the Act and no property rights shall exist in such liquor or property, and that *all* provisions of the statute shall be liberally construed in order that the unlawful use of intoxicating liquor may be prevented. Section 10 should have been construed with reference to the whole system of prohibition enforcement, of which it forms a part. See *McDougald* v. *Dougherty,* 14 Ga. 674, 681. The purpose is to harmonize one part of an act with another in accord with its general intent. If the court had considered the entire statute, with a view to giving a liberal construction to all its provisions, as Congress evidently intended, we believe it would not have, in effect, substituted one set of words for another.

III

DECISIONS UNDER THE ANTI-NARCOTIC ACT ARE NOT APPLICABLE TO THIS CASE

In reaching its conclusion the court below relied on certain decisions under the Harrison Anti-Narcotic Act, among them the decision of this Court in *United States* v. *Jin Fuey Moy,* 241 U. S. 394. These decisions, however, are not controlling here. There is a marked distinction between the Anti-Narcotic Act and the statute under consideration. The title of the Anti-Narcotic Act (Chap. 1, 38 Stat. 785), reads:

> An Act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes.

Section 1 provides:

> That * * * *every person who* * * * sells, * * * opium * * * shall register with the collector of internal revenue * * *. At the time of such registry and on or before the first day of July, annually thereafter, every person who * * * sells, * * * any of the aforesaid drugs shall pay to the said collector a special tax * * *.

> It shall be unlawful for any person required to register under the terms of this Act to * * * sell, * * * any of the aforesaid drugs without having registered and paid the special tax provided for in this section. * * * (Italics ours.)

Section 8, on which many of the cases cited by the court are based, declares:

> That it shall be unlawful for any person *not registered under the provisions of this Act*, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of *this section*, and also of a violation of the provisions of *section one* of this Act. * * * (Italics ours.)

The possession forbidden by Section 8 is of a person " not registered under the provisions of this Act "—not possession generally by all persons. The offense is not the possession of the drug, but the possession for some of the purposes for which registration is required, without having registered and paid the tax. Plainly the person who has not so registered and paid the required tax refers only to one who is required by Section 1 of the Act to register and pay such tax. No possession is referred to by " this section " of which there can be a violation other than the possession of one who is required by Section 1 to register and pay the tax. And so, as the indictments in the cases re-

ferred to did not charge that the defendants were persons required to register under the Act, it was held that they stated no offense. In the *Jin Fuey Moy* case, *supra,* this Court, while recognizing that the statute had a moral end in view, treated it as a revenue measure, and for this reason may have refrained from giving it a liberal construction.

The National Prohibition Act is not a revenue statute but, as heretofore pointed out, is designed to abolish the traffic in intoxicating liquors for beverage purposes, and to that end should be liberally construed. Section 10 contains no restriction or qualification such as is found in Section 8 of the Anti-Narcotic Act that it shall apply only to persons who have registered or taken out permits under the Act. It directs that *no person* shall deal in liquor without making a permanent record. In other words, it requires every person selling liquor to make a record. The reference in Section 8 of the Anti-Narcotic Act is not to all persons, but to any person " not registered under the provisions of this Act." In view of these distinctions in the two statutes, it is submitted that the cases relied on have no bearing upon the validity of the present indictments.

The court's construction of the Act, that only persons holding basic permits can be guilty of violating the requirement of making permanent records, has the effect of rewarding the bootlegger, illegitimate drug concerns, and others, to whom no

licenses will be issued, by subjecting them to a less penalty than is imposed upon the legitimate dealers who sell liquor under a permit. If, for example, the legitimate dealer, who complied with the law by securing a permit, were charged with transporting and selling in violation of his permit, and also with failing to make a permanent record, he could be prosecuted for all three offense, while the bootlegger and illegitimate dealer, equally guilty of unlawful sale and transportation and of failing to make a record, could be prosecuted only for the first two offenses and not for the latter, merely because he had failed or refused to comply with the law by taking out a permit. Obviously this cannot have been the intention of Congress. It is not in keeping with the object intended to be accomplished by the Act.

The true meaning of any clause or provisions in an act is that which best accords with its object and general purpose. The object and general purpose of the National Prohibition Act have been described as " to conserve public health and morals, and to that end to keep watch and ward over all movement of liquors from start to finish." *United States* v. *One Cole Automobile,* 273 Fed. 934, 936. If Congress had intended Section 10 to apply only to permit holders, it is reasonable to assume it would have said so instead of employing the broad, general language found in that section. Moreover, the court's interpretation leads to an absurd re-

sult. A statute should not be given an absurd interpretation. An interpretation which leads to consequences that are mischievous and absurd is inadmissible, if the statute is susceptible of any other interpretation, for such consequences can not be deemed intended.

The court seems to have been influenced by the provision in the latter part of Section 10 that the Commissioner of Internal Revenue may prescribe the form of such record, which at all times shall be open to inspection as provided in the Act. The court construes this provision as mandatory on the Commissioner, and therefore as requiring the record to be made on the form prescribed by him. If this were so, the duty of keeping the record would arise only when, and be dependent upon whether, the Commissioner had prescribed the form of such record, and a defendant would be enabled to escape punishment for failing to keep a record on the excuse or ground that the Commissioner had failed to prescribe a form. This cannot have been the intent of Congress in view of the fact that, in the first part of the Act, it imposed the mandatory and unqualified duty of keeping a record by everyone manufacturing and selling liquor. It seems clear from a reading of the whole section that the duty of keeping a record is manda-

tory and that the prescribing of the form is discretionary with the Commissioner.

Prosecutions for violations of Section 10 by nonpermit holders have heretofore been sustained.

> *De Witt* v. *United States,* 291 Fed. 995, C. C. A. 6th. (Certiorari denied, 263 U. S. 714.)
>
> *Edenfield* v. *United States,* 8 F. (2d) 614, C. C. A. 5th. (Petition for writ of certiorari now pending in this Court.)
>
> *Ex Parte Poole,* 273 Fed. 623, Mont.

The opinion of the Circuit Court of Appeals for the Sixth Circuit in *Small Grain Distilling & Drug Company* v. *Hamilton,* 276 Fed. 544, 546, expresses the Government's view of this statute:

> It provides for a general and primary record to be made by every person handling liquor, whether that person is vendor, or vendee, or carrier, and it prescribes a duty for every person concerned in the sale or delivery.

CONCLUSION

In view of the foregoing, the Government submits that the court below erred in its construction of the statute and in holding that the indictments in question did not state an offense because they failed to charge that the defendants who sold the liquor without making the required record were permit holders under the Government. The judg-

ment of the court sustaining the demurrers and quashing the indictments should, therefore, be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
MAHLON D. KIEFER,
Senior Attorney.

FEBRUARY, 1926.

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Nos. 726 and 727

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1925

United States, Plaintiff in Error

v.

Jacob Katz and George Senn

United States, Plaintiff in Error

v.

Jacob Katz and Herman Feuerstein

On Writs of Error to the United States District Court for the Eastern District of Pennsylvania

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 726

UNITED STATES, PLAINTIFF IN ERROR,

v.

JACOB KATZ and GEORGE SENN.

No. 727

UNITED STATES, PLAINTIFF IN ERROR,

v.

JACOB KATZ and HERMAN FEUERSTEIN.

ON WRITS OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

In the cases now before the Court, the District Court of the United States for the Eastern District of Pennsylvania entered an order sustaining demurrers to two bills of indictment and quashing and dismissing the indictments.

In one bill of indictment No. 1123 as of December Term, 1924, it was charged that the defendants, Jacob Katz and Herman Feuerstein, conspired to commit an offense against

the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Senn 250 cases of whiskey without making a permanent record as required under Section 10 of the National Prohibition Act.

In the other indictment No. 1124, as of December Term, 1924, it was charged that the defendants, Katz and Feuerstein, conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Feuerstein 25 barrels of whiskey without making a permanent record as required by Section 10 of the National Prohibition Act.

The reason for the sustaining of the demurrers and quashing of the bills of indictment, as more fully appears from the opinion of the District Court on page 5 of the record in case No. 726 and page 4 in case No. 727, was that the indictments fail to set forth an offense against the United States inasmuch as Section 10 of the National Prohibition Act, under which they were framed, applies only to persons holding permits for dealing in intoxicating liquor.

It is respectfully submitted that the District Court committed no error in the entry of its orders which are brought before this Court upon the writs of error in this cause and that its decision should be affirmed.

UNDER A FAIR AND PROPER CONSTRUCTION OF TITLE II OF THE NATIONAL PROHIBITION ACT A PERMANENT RECORD OF THE MANUFACTURE, PURCHASE, SALE OR TRANSPORTATION OF LIQUOR IS REQUIRED TO BE KEPT ONLY BY PERMIT HOLDERS.

The National Prohibition Act is more than an Act prohibiting intoxicating beverages as contended for by the Government. The title of the Act itself is as follows:

> "An Act to prohibit intoxicating beverages and to regulate the manufacture, production, use and sale of

high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries" Chap. 85, 41 Stat. 305, United States at Large, Vol. 1, Part I, page 305.

It is thus seen that the purpose of the Act is to regu-te the manufacture, production, use and sale of high proof pirits for other than beverage purposes and to insure an mple supply of alcohol and promote its use, as well as to rohibit intoxicating beverages.

By Section 3 of Title II of the National Prohibition ct, it is provided:

"No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

"Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: PROVIDED, That nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts."

By this section, the dealing in liquor by all persons ther than those expressly excepted by the provisions of

the National Prohibition Act is prohibited, and the purpose of Congress to prohibit intoxicating beverages is carried into effect by its provisions.

Section 4 of the Act provides that certain articles, when manufactured and prepared, for market, shall not be subject to the provisions of the Act. After enumerating these articles, it further provides:

> "A person who manufactures any of the articles mentioned in this section may purchase or possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the report specified in this Act and as directed by the commissioner."

Section 6 of the Act provides:

> "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the commissioner is conducting a bona fide hospital or sanitorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the commissioner shall prescribe, purchase and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution."

Section 7 provides that no one but a physician, holding a permit to prescribe, shall issue any prescription for liquor.

Section 8 provides for printed blanks for prescriptions to be used by physicians.

Section 10, the section upon which the indictments in the instant case were framed, provides:

> "No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this Act provided."

The contention of the Government that this section of the Act should receive a literal interpretation and construction and should not be interpreted by a consideration of what goes before and what follows after it in the Act, it is respectfully submitted, is unsound.

That a particular section of a statute must be construed from the general view of the whole act of which it forms a part, as this statute was construed by the learned Court below, has been frequently and authoritatively decided.

In Vol. 26 A. and E. Ency. of Law, 616, it is said:

> "In construing a section of an act, regard must first be had to the language of the clause itself; and, second, to other clauses in the same act, and that construction should be adopted which makes the whole act stand consistently together, or reduces the inconsistency to the smallest possible limits."

In Vol. 36 CYC, page 1128, we read:

> "In construing a statute, the legislative intent is to be determined from a general view of the whole act,

with reference to the subject matter to which it applies and the particular topic under which the language in question is found."

"It is a cardinal rule in the construction of statutes that effect is to be given, if possible, to every word, clause and sentence. It is the duty of the Court, so far as practicable, to reconcile the different provisions so as to make them consistent and harmonious, and to give a sensible and intelligent intent to each."

In Vol. 25 R. C. L. Sec. 247, it is further said:

"Obviously, in order that effect may be given to every part of an act in accordance with the legislative intent, all the language of the act must be considered and brought into accord. It is not safe to base a construction upon a particular word or phrase, for the language of legislative enactments is not always precise and accurate, and, besides, one portion may frequently be designed to extend, quality, or limit another, that the meaning of one portion of a statute may depend upon the effect of another. Hence, it is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute taken and compared together."

In United States v. Boisdore's Heirs, 8 Howard 122, it was said:

"In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

In United States v. Burr, 159 U. S. 84, Chief Justice Fuller, delivering the opinion of this Court, said inter alia:

"Moreover, in arriving at the true intention of Congress, we cannot treat section 1 as if it constituted the entire act but must deduce the intention from a view of the whole statute and from the material parts of it."

If the construction referred to in the authorities herein cited is adopted in the instant case, it is respectfully submitted that it must be held it was the intention of Congress, when it passed the National Prohibition Act, to provide that any one manufacturing, selling, purchasing, transporting or prescribing liquor should, before engaging in such practice, procure a permit from the Prohibition Commissioner and that, after such permit was granted, the person to whom the same had been granted, should make a permanent record thereof of the amount and kind of liquor which figured in the transaction of manufacture, purchase, sale or transportation. It is quite obvious that it was not the intention of Congress to provide that persons who had no right under the law to manufacture, sell, purchase for sale, or transport liquor should make a permanent record thereof of any act of manufacture, purchase, sale or transportation. It was only the lawful and permissible manufacture, sale, etc., which Congress had in mind when it provided for the making of a permanent record. This becomes even more apparent when consideration is given to the last clause of Section 10 of the Prohibition Act, which reads:

"The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this Act provided."

Surely it was never contemplated that the commissioner should prescribe a form of record for an illegal or non-permissible act of manufacture, sale, etc.

Further strength is added to the contention made here

on behalf of the defendants in error that Section 10 has no application to them in view of the fact that they were not permit holders by a consideration of Section 29 of the National Prohibition Act.

By the provisions of that section, it is provided:

> "Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.
>
> "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar."

A consideration of the authorities construing and interpreting the Harrison Anti-Narcotic Act, containing similar provisions to the provisions of the National Prohibi-

tion Act now under consideration, would seem to indicate that the construction of the statute made by Judge Thompson in the Court below, when he sustained the demurrers to the indictments, was a proper one.

Section 1 of the Harrison Anti-Narcotic Act, Chap. 1, 38 Stat. 789, provides:

> "Every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes or gives away opium, or coca leaves, or any compound, manufacture, sale derivative, or preparation thereof, shall register with the Collector of Internal Revenue of the District his name or style, place of business, and place or places where such business is to be carried on."

Section 8 provides:

> "It shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section and also a violation of the provisions of section 1 of this Act."

Numerous prosecutions have been instituted charging possession of drugs without registration. The Courts have uniformly held that possession, under section 8 of this Act, by "persons not registered under the provisions of this Act must be construed, with reference to section 1, which requires only certain persons to register, and that possession by persons not in the class defined constitutes no violation of the Act and indictments, charging possession by such persons, are defective and insufficient".

In UNITED STATES vs. WILSON, 225 Fed. 82, the defendant was indicted for the violation of the Act of

Congress approved December 17th, 1914, known as the "Harrison Anti-Narcotic Law".

The first section of this Act provides:

> "Every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium, or coca leaves, or any compound, manufacture, sale derivative, or preparation thereof shall register with the Collector of Internal Revenue of the district his name or style, place of business, and place or places where such business is to be carried on."

The Bill of Indictment charged the defendant with the violation of Section 8 of the Act, which is as follows:

> "It shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs."

In holding that the indictment charged no offense, Judge McCall of the Western District of Tennessee, said:

> "The question now arises, to whom does the clause 'any person not registered under the provisions of this Act and who has not paid the special tax' in the eighth section refer? Clearly, it refers to, and at least includes, those doing the things specifically named in the first section. Does it refer to and include others doing things not specifically named in the Act, viz., those having in their possession or under their control the drugs named for their personal consumption? It seems to me that to so hold would be for the Court to enlarge the list of those whom Congress required to register and pay the special tax. To that extent it would be an amendment of the Act. This is not the function of the Court. If Congress had intended

to require persons to register who had in their possession or under their control drugs for any purpose other than that stated in the Act, it would seem that it would have been a simple matter to have said so. It is clear to my mind that the language quoted from the eighth section, supra, when read in connection with the first section of the Act, refers only to those mentioned in the last named section, and however desirable it may be to have that list enlarged, the Court is without authority to do it."

In UNITED STATES vs. CARNEY, 228 Fed. 163, defendant was indicted on a charge of having violated the provisions of the Harrison Act in that the defendant had in his possession knowingly and unlawfully a large quantity of morphine without having registered his name and place of business with the Collector of Internal Revenue and without having paid the special tax required by the Act. A demurrer to the bill was filed. In sustaining the demurrer, it was there said:

"It seems quite clear that the Act in question is to be construed as one imposing a tax upon those who engage in dealing in and handling the drugs mentioned as a part of their business, and that a single sale, or having in possession a small quantity of the drug by one not engaged in the business of dealing in them, is not within the terms of this Act. . . . .

"The possession forbidden by this Section is of a person 'not registered under the provisions of this Act'. Plainly the person who has not so registered and paid the required tax refers only to one who is required by section 1 of the Act to register and pay such tax. No other possession is referred to by this section of which there can be a violation, other than the possession of one who is required by Section 1 to register and pay the tax. The section will reasonably bear no other interpretation; and as the defendant is

not charged with being a person required by the Act to register, or having engaged in any business that requires him to do so, the indictment fails to charge an offense against him under this Act. It was so held by Judge McCall in UNITED STATES v. FRIEDMAN, (D. C. 224 FED. 276) and UNITED STATES v. WILSON, 225 FED. 82, by Judge Borquin in UNITED STATES vs. WOODS, 224 FED. 278, and by Judge Thomson in UNITED STATES v. JIN FUEY MOY, 225 FED. 1003, upon indictments quite similar to the one in question."

In SWARTZ vs. UNITED STATES, 280 Fed. 115, the Circuit Court of Appeals for the Fifth Circuit in holding an indictment defective and insufficient to sustain a conviction said:

"It is insisted in this court that neither indictment, nor count, states an offense against the United States; that the Harrison Narcotic Act is a revenue statute, and the offense consists in the failure of those to register and pay the tax, who produce, import, manufacture, compound, deal in, dispense, sell, or give away opium, etc., as specified in the first section of the Act (section 6287g); that the offense denounced in the eighth section is the possession by those who are required to register, and not possession generally by all persons; and that an indictment which charges unlawful possession by one not registered, without alleging that he was one of the class required to register, charges no offense against the United States.

"We think that the objection is good and that the indictments are fatally defective. The offense is not the possession of morphine or cocaine, but the possession for some of the purposes for which registration is required; without having registered and paid the tax; and while proof of possession, under section 8 of the Act (section 6287n), casts the burden

of proof upon the defendant (Gee Woe v. United States, 250 Fed. 428, 162 C. C. A. 498), the indictment charges no violation of the Act, unless it charges that the possession was for a purpose for which registration is required, and that the accused had not registered. This we understand to be the decision of United States Supreme Court in the case of United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917 D, 854. To this effect are the following cases: United States v. Bernstein, (D. C.) 255 Fed. 339; United States v. Carney (D. C.) 228 Fed. 163; United States v. Woods (D. C.) 224 Fed. 278."

In UNITED STATES v. JIN FUEY MOY, 241 U. S. 394, an appeal was taken from the action of Judge Thomson of the District Court for the Western District of Pennsylvania, quashing an indictment framed upon the provisions of the Harrison Anti-Narcotic Act. The indictment charged a conspiracy by the Defendant with Willie Martin to have in Martin's possession opium. It averred that Martin was not registered with the Collector of Internal Revenue and had not paid the special tax required. Mr. Justice Holmes at the end of an exhaustive opinion in affirming the judgment of the District Court, which held that no offense was charged, said:

"Approaching the issue from this point of view we conclude that 'any person not registered' in section 8 cannot be taken to mean any person in the United States but must be taken to refer to the class with which the statute undertakes to deal—the persons who are required to register by section 1. It is true that the exemption of possession of drugs prescribed in good faith by a physician is a powerful argument taken by itself for a broader meaning. But every question of construction is unique, and an argument

that would prevail in one case may be inadequate in another. This exemption stands alongside of one that saves employees of registered persons as do sections 1 and 4, and nurses under the supervision of a physician, &c., as does section 4, and is so far vague that it may have had in mind other persons carrying out a doctor's orders rather than the patient's. The general purpose seems to be to apply to possession exemptions similar to those applied to registration. Even if for a moment the scope and intent of the act were lost sight of the proviso is not enough to overcome the dominant considerations that prevail in our mind."

In the instant case, there were no averments in the bills of indictment that the defendants were persons named or contemplated in the sixth section of the National Prohibition Act, that is, persons who were engaged in the practice or business of manufacturing, selling, etc., liquor and who were under an obligation to secure a permit before they could engage in such business.

It is, therefore, respectfully submitted that, giving effect to the entire National Prohibition Act and particularly to that part under the heading Title II, Congress intended to prohibit the manufacture, sale, etc., of liquor by all persons, with certain specified exceptions, and this is provided for in section 3 of the Act. That for a violation of section 3, a penalty was provided in the first part of Section 29, wherein a fine of not more than $1,000 or imprisonment not exceeding six months was provided for a first offense, and for second offenses a fine of not less than $200 nor more than $2,000 and imprisonment of not less than one month nor more than five years was provided; that, after enacting section 3, Congress provided for the regulation of the manufacture, production, use and sale of liquor by providing for the issuance of per-

mits, the dispensing of liquor by prescription, etc., and by section 10 of the act directed that all persons who had permission under the provisions of the Act to deal in liquor should keep a permanent record of their dealings.

DEPARTMENTAL CONSTRUCTION OF TREASURY DEPARTMENT NEGATIVES CONSTRUCTION CONTENDED FOR BY THE GOVERNMENT.

As an aid in the construction of the section of the statute now under consideration, recourse may be had to the rules and regulations prescribed by the Prohibition Unit of the Bureau of Internal Revenue of the Treasury Department.

By Section 10 of the National Prohibition Act, the Commissioner is given the right to prescribe the form of permanent records to be kept of the manufacture, purchase for sale, sale or transportation of liquor.

Regulations 60, revised March, 1924, which are the last regulations prescribed, provide for the matter of such records to be kept in sections 170 to 174 inclusive. In these regulations, the commissioner has provided for and prescribed records only for permit holders. He has not attempted to prescribe records for non-permit holders nor has he made any rules requiring the keeping of such records.

Section 180 of these regulations has to do with the inspections of records and gives authority to inspect the premises of permittees only.

It thus becomes apparent that, by the interpretation placed upon the National Prohibition Act by the administrative branch of the Government charged with its enforcement, provision is made only for the keeping of records by persons who are lawfully permitted to deal in liquor.

having them produce either copies of the records or the original records, and in such event the defendant would not fall under or be entitled to the immunity of Section 30.

It is submitted that BOYD v. UNITED STATES, 116 U. S. 616, condemns such legislative requirements as being in violation of the provisions of the Fourth and Fifth Amendments.

The facts of that case were as follows: The Act of June 22nd, 1874 authorized a court, in revenue cases, on motion of Government attorney, to require the defendant or claimant of goods to produce his private books in court or otherwise the allegations of the attorney were to be taken as confessed.

The Trial Court made an order directing the defendant to produce the invoice or paper relating to the importation of merchandise, which was the subject of the Customs Revenue law, so that the United States attorney and his assistants should be allowed before the court and under its direction to make an examination of the invoice or paper and to take copies thereof.

In holding that the order directing the production of the paper or invoice and the allowance of an inspection of it by the United States attorney was improper and illegal and offended against the Fourth and Fifth Amendments of the Constitution of the United States, the Court, in an opinion by Justice Bradley said:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence;

but it is the invasion of his indefeasible right of personal security; personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

* * * * * * * * * *

"We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings."

In the case at bar, it is respectfully submitted, that the provisions of section 10 of the National Prohibition Act as applicable to persons holding permits to deal in liquor is a constitutional exercise of the legislative power and this is consistent with the opinion delivered by the learned Court below; whereas if section 10 is held to be applicable, to persons who hold no permits to engage in transactions relating to liquor, then by its provisions the non-permit holder is compelled to incriminate himself by making a record showing his unlawful transaction and such a legislative requirement is in clear conflict with the provisions of the Fourth and Fifth Amendments to the Constitution of the United States.

For the reasons herein given, it is respectfully submitted, that the judgment of the Court below, sustaining the demurrers and quashing the indictments, should be affirmed.

Respectfully submitted,

JOHN R. K. SCOTT,
BENJAMIN M. GOLDER,
WILLIAM T. CONNOR,
Attorneys for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

Nos. 726-727.—October Term, 1925.

The United States of America, Plaintiff in Error, 726 *vs.* Jacob Katz and George Senn.	Error to the District Court of the United States for the Eastern District of Pennsylvania.
The United States of America, Plaintiff in Error, 727 *vs.* Jacob Katz and Herman Feuerstein.	

[May 24, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

The two defendants in error in each of these cases were indicted in the Eastern District of Pennsylvania for a conspiracy to sell intoxicating liquors without making a permanent record of the sale, in violation of § 10, Title II of the National Prohibition Act, of October 28, 1919, c. 85, 41 Stat. 305, 310.

The indictment in No. 726 charged that the defendant, Katz, conspired with the defendant, Senn, to sell for the Stewart Distilling Company, to Senn, a quantity of whisky, without making a record of the sale. A similar offense was charged against the defendants named in the indictment in No. 727.

Demurrers and motions to quash were interposed to both indictments, on the ground that they failed to charge any crime. In support of this contention it was argued that § 10, which requires a permanent record to be made of sales of intoxicating liquors, applies only to persons authorized by the National Prohibition Act to sell alcoholic liquor; and that the indictment failed to allege that either of the defendants charged with making the sales, or the Stewart Distilling Co., held a permit, or was otherwise authorized to sell. The indictments were quashed by the district court. 5 F.

(2d) 527. The cases come here on writ of error to the district court, under the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

The overt act charged in each indictment was the sale of whisky by one defendant to the other. This is an offense under the National Prohibition Act; but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity. Compare *United States* v. *N. Y. C. & H. R. R.*, 146 Fed. 298; *United States* v. *Dietrich*, 126 Fed. 664; *Vannata* v. *United States*, 289 Fed. 424, 427. This embarrassment could be avoided in an indictment for a criminal conspiracy only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion. See *Chadwick* v. *United States*, 141 Fed. 225.

Hence the Government takes the position that the seller of intoxicating liquor is required by the statute to keep a permanent record of his sales, whether lawful or unlawful, and that failure to do so is itself a crime; from which it would follow that a conspiracy to effect a sale without such a record is an indictable offense. No question is made but that persons authorized to deal in alcoholic liquors under the Prohibition Act are required to make permanent records of their transactions. But the Government, to support a charge of conspiracy applicable to buyer and seller, relies on the literal application of § 10.

"No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this Act provided."

Section 34 provides:

"All records and reports kept or filed under the provisions of this Act shall be subject to inspection at any reasonable hour by the commissioner or any of his agents or by any public prosecutor

or by any person designated by him, or by any peace officer in the State where the record is kept, and copies of such records and reports duly certified by the person with whom kept or filed may be introduced in evidence with like effect as the originals thereof, and verified copies of such records shall be furnished to the commissioner when called for."

To uphold the contention of the Government, therefore, the language of § 10 must be taken to apply not only to those who hold Government permits authorizing them to deal in intoxicating liquors under a familiar system of regulation, to whom it admittedly is applicable, but to every criminal violator of the National Prohibition Act, even though making only a single, isolated sale. It must be taken also to extend the provisions of § 34, clearly applicable to such permittees, in such a way as to present the incongruity of a system of records to be kept by criminal violators of the Act who are not permittees, in a form which the Commissioner may prescribe, which may be introduced in evidence on the certification of the person "with whom kept", and verified copies of which are to be furnished on demand, presumably by the criminal keeping the record.

We are not now concerned with any question of legislative power to establish such a system but only with the question whether it was the intention of Congress to do so.

All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose. See *Hawaii* v. *Mankichi*, 190 U. S. 197, 212, and cases there cited. In ascertaining that purpose, we may examine the title of the Act (*United States* v. *Fisher*, 2 Cranch 358, 386; *United States* v. *Palmer*, 3 Wheat. 610, 631; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 462), the source in previous legislation of the particular provision in question (*United States* v. *Saunders*, 22 Wall. 492; *Viterbo* v. *Friedlander*, 120 U. S. 707; *United States* v. *Morrow*, 266 U. S. 531, 535), and the legislative scheme or plan by which the general purpose of the Act is to be carried out. See *Platt* v. *Union Pacific R. R.*, 99 U. S. 48, 63-64; *Bernier* v. *Bernier*, 147 U. S. 242, 246.

One purpose of the National Prohibition Act was to suppress the entire traffic in intoxicating liquor as a beverage. *Grogan* v. *Walker & Sons*, 259 U. S. 80, 89. But the Eighteenth Amendment

did not prohibit the use of intoxicating liquor for other than beverage purposes, and an important purpose of the Act, as its title[1] and contents show, was to regulate the manufacture, transportation and use of intoxicating liquor for other than beverage purposes.

Section 3, Title II, which prohibits the manufacture, sale and possession of intoxicating liquor, expressly provides that "liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor. . . ." To make the prohibitions of the Act effective, and to provide for the production and use of liquor for nonbeverage purposes, it became necessary for the Government to regulate and supervise those uses of intoxicating liquor which were not prohibited. Congress had before it the provisions of the Revenue Law (Comp. Stat. 1916, §§ 5981 to 6161) governing distillers, rectifiers, and brewers, requiring detailed records of all transactions, and laying down other regulations designed to promote the effective collection of liquor taxes; it also had before it the regulatory system devised by the Internal Revenue Bureau for carrying into effect the prohibitory legislation contained in the Food Control Act of August 10, 1917, c. 53, 40 Stat. 276, and subsequent war legislation. See 21 T. D. 7, No. 2788.

The business affected by this legislation was lawful business, subject to governmental regulation; records of transactions were required to be kept, as a condition of receiving governmental permission to operate, and such records were a convenient and necessary means for protecting the interests of the Government with respect to its revenues. When Congress came to enact the National Prohibition Act, a similar method of permit or license and a similar system of records afforded a convenient means for the regulation and control of those dealing with alcoholic liquors for the nonbeverage purposes as authorized by the statute.

The reports of the Committees of the Senate and House having the bill in charge, as well as the statute as adopted, indicate clearly

[1] "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries."

that the purpose of Congress was to take over an established and well known system of granting permits and requiring reports and records, for the purpose of regulating and controlling such portion of the liquor traffic as had not been prohibited by the Eighteenth Amendment and the National Prohibition Act.[2] The report of the Senate Committee is also persuasive that the provisions of § 34, already quoted, relating to "all records and reports kept or filed under the provisions of this Act", refer to records and reports required of permittees.[3] Nowhere in the

[2]Report No. 151 of the Senate Judiciary Committee, Aug. 18, 1919, to accompany H. R. 6810, which became the National Prohibition Act, contains the following statement on p. 20:

"The provisions requiring those who sell or manufacture liquor for non-beverage purposes to secure a permit is a continuation of the system now enforced by the Federal authorities. It is the most effective means to insure obedience to the law and prevents the diversion of liquor for illegal purposes. It is a slight burden on the law-abiding citizens who are dealing in liquor for legal purposes."

Report No. 91, Part 1, of the House Judiciary Committee, June 30, 1919, to accompany H. R. 6810, contains the following statement on p. 2:

"Title 2, to enforce prohibition under the eighteenth amendment to the Constitution, contains substantially the same features at title 1 and in addition a system of permits such as is now in force under regulations of the Revenue Department, Treasury Decision 2788, and in the various prohibition codes. These permits are designed to prevent diversion of liquor from legal to illegitimate uses. This system greatly lessens prosecution by making it difficult for persons to obtain liquor except for legitimate purposes. In addition to the permit system, which is also provided for in title 3 (the industrial-alcohol section) the act carries a number of the more essential penal provisions of the ordinary prohibition codes, such as those against advertising liquor."

[3]The Senate report, pages 7-8, contains the following statement with reference to the provisions of the present § 34 of the National Prohibition Act:

"The requirement of section 35 [now 34]—that the commissioner file all the reports, statements, and information required by Title II as a part of the files of his office, in a permanent record, alphabetically arranged, with an indorsement showing the date when filed, etc., and to furnish certified copies of such reports, statements, and information to any person requesting the same—is deemed by the committee an unnecessary requirement, and one which will result in cumbering the office of the commissioner with reports, information, and data which would serve no useful purpose; that for all practical purposes it will be sufficient if all records and reports kept on file under the provisions of the act shall be subject to inspection by the commissioner or any of his agents or by any public prosecutor or any person designated by him, and that copies of such records and reports, duly certified, may be introduced in evidence with like effect as the originals thereof. The committee has amended section 35 [now 34] accordingly. Section 10, it will be observed, authorizes the commissioner to prescribe the form of the permanent record to be made by the manufacturer, purchaser, seller, or transporter of any liquor, and requires that such permanent record be at all times open to inspection by the commissioner or his agents."

reports of the Committees does it appear that any such novel legislation was being proposed as is here contended for by the Government. On the contrary, it is stated in the report of the House Judiciary Committee, p. 7, that "Title 2 for the enforcement of the eighteenth amendment has in it no new or experimental features. Every provision in it has precedents in State or Federal legislation." The Government does not suggest that there is in fact any precedent in legislation, state or national, for the interpretation which it urges here.

Of the thirty-nine sections in Title II of the Act, which deals with national prohibition, more than half, including the seven sections which precede § 10, contain provisions authorizing or regulating the manufacture, sale, transportation or use of intoxicating liquor for nonbeverage purposes.[4] These provisions, read together, clearly indicate a statutory plan or scheme to regulate the disposi-

[4]The following examples may be noted:

§ 4 exempts from the operation of the Act, denatured alcohol, medicinal and toilet preparations, etc. It authorizes the manufacture of these articles and the purchase and possession of alcoholic liquors for that purpose under government permit, and requires the manufacturer to "keep the records, and make the reports specified in this Act and as directed by the commissioner."

§ 5 provides for the revocation of permits if the product manufactured does not comply with the requirements of § 4.

§ 6 prohibits the sale, purchase, transportation or prescription of liquor without a permit from the Commissioner, issued as prescribed in the section, except the purchase and use for medicinal purposes and for the treatment of alcoholism. This section also exempts sacramental wines from the provisions of the Act, except as to the requirements of § 6 for permits (save for purchase) and to the requirements of § 10 for the keeping of records.

§ 7 authorizes physicians to prescribe liquor under government permit and requires a record of such prescriptions.

§ 9 authorizes proceedings for the revocation of permits for the violation of the Act, and § 27 provides that seized liquor may, under order of the court, be ordered sold to persons holding permits to purchase.

§ 11 requires manufacturers and wholesale or retail druggists to keep, as part of the records required of them, a copy of all permits to purchase on which sales are made, and prohibits them from selling except to persons having permits to purchase.

§ 12 requires manufacturers of liquor for sale to attach to every package a label describing its contents.

§ 13 makes it the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and § 14 requires the packages carried to be labeled in a specified way.

tion of alcoholic liquor not prohibited by the Eighteenth Amendment, in such manner as to minimize the danger of its diversion from authorized or permitted uses to beverage purposes. These provisions plainly relate to those persons who are authorized to sell, transport, use or possess intoxicating liquors under the Eighteenth Amendment and the provision of § 3 of the Act, already quoted.

No section of the Act requiring records to be made of dealings in alcoholic liquors relates to any but dealings authorized or permitted under the statute, unless it be § 10. The question is thus presented, whether the requirement of § 10 that "no person shall . . . sell . . . liquor without making at the time a permanent record thereof" is a regulatory measure applicable to persons authorized to deal in nonbeverage liquors, or whether it was intended to add to the crime of manufacturing, selling or transporting, a second offense, whenever the person committing the crime should fail to make a record of his own wrongdoing. When the statute is read as a whole, and the implications of the latter interpretation are taken into account, we think that it is not a reasonable or a fairly admissible interpretation.

General terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation. *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *Holy Trinity Church* v. *United States*, *supra*; *United States* v. *Kirby*, 7 Wall. 482; *United States* v. *Palmer*, *supra*.

In *United States* v. *Palmer*, the defendants, not citizens of the United States, were indicted for a robbery committed on a foreign vessel on the high seas, under a statute which provided that "if any person or persons shall commit upon the high seas . . . out of the jurisdiction of any particular state, murder or robbery . . . ", such offender should be guilty of piracy and punishable with death. Chief Justice Marshall pointed out that Congress, under its constitutional power to define and punish piracy, had authority to make a statute applicable to the defendants; but, applying the principle of statutory construction to which we have referred, he held that the words "any person or persons", although broad enough to comprehend every human being, could not, in

view of the exceptional consequences of a literal application, and the intent of the legislature, as derived from the title of the Act and a reading of the whole statute, be construed to apply to persons, not citizens, who committed offenses on foreign vessels on the high seas.

In *United States* v. *Jin Fuey Moy, supra,* the defendant was indicted for a conspiracy "to have in . . . possession" of another person, not registered, a quantity of opium, in violation of the Opium Registration Act of 1914, which declared it unlawful for "any person" who had not registered and paid the prescribed tax, to have in his possession or control any of the drug in question. This court held that the words "any person not registered" could not be taken to apply to any person in the United States, but must be read in harmony with the purpose of the Act, to refer to persons required by law to register.

We think the reasoning of these cases applicable here, and that the words "no person", in § 10 refer to persons authorized under other provisions of the Act to carry on traffic in alcoholic liquors. It is not without significance that the Commissioner has never made any regulation with respect to records of bootlegging transactions and that the published regulations contain no suggestion that § 10 has any application except to persons who hold permits, or are otherwise authorized by law to traffic in intoxicating liquor. See *National Lead Co.* v. *United States,* 252 U. S. 140, 145.

Affirmed.

Mr. Justice BRANDEIS dissents.

A true copy.

Test:

Clerk, Supreme Court, U. S.